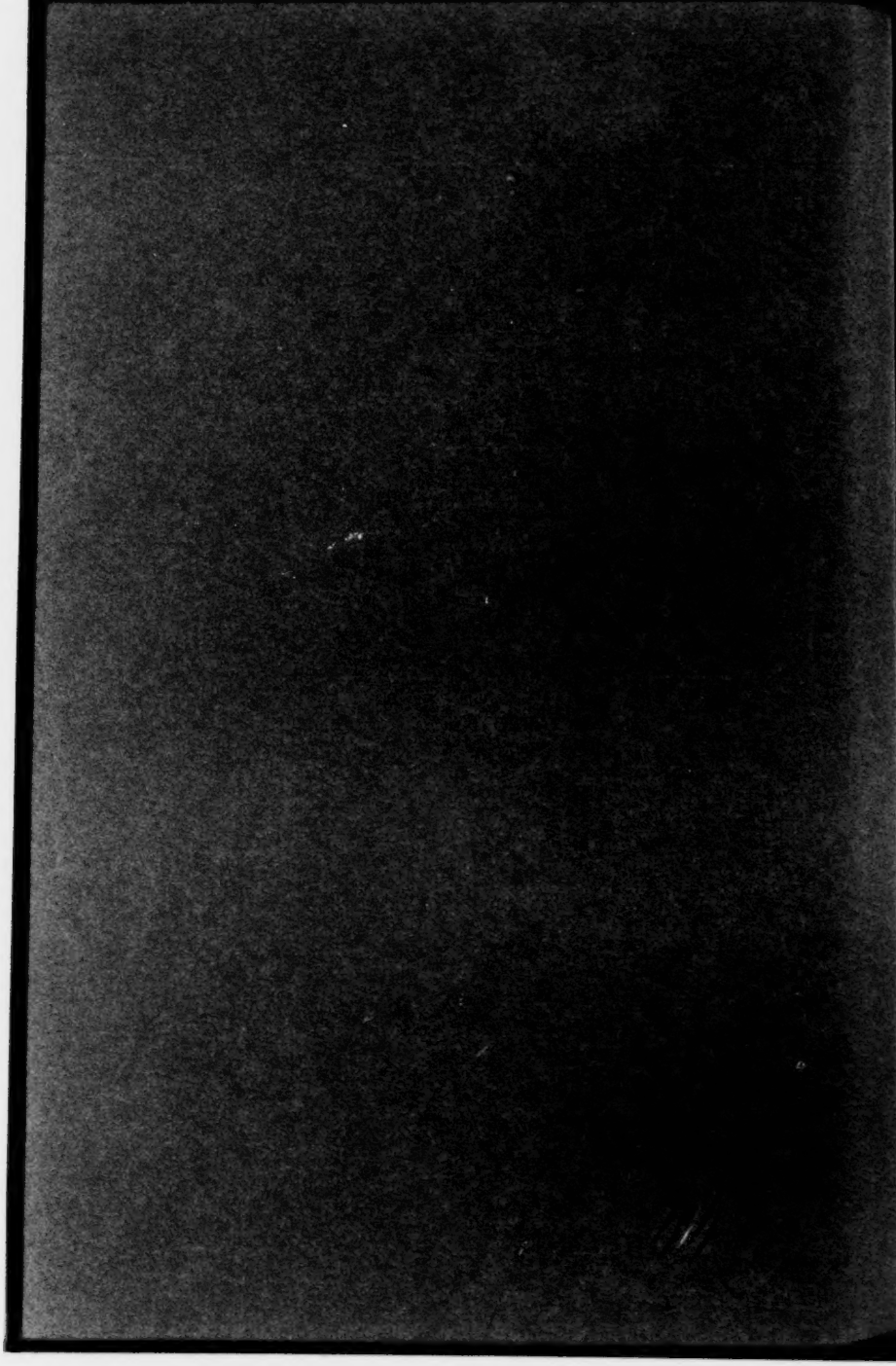

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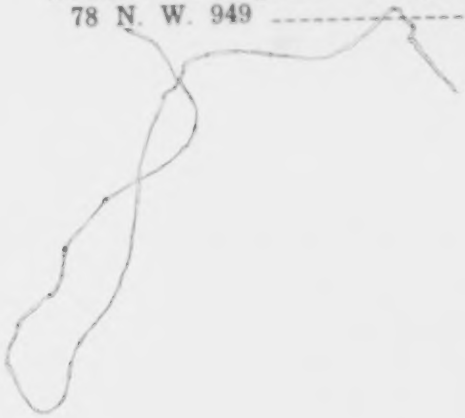

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No. 957.

ALFONSE DOBRUSKY, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON,
Attorney General of Nebraska,

CLARENCE S. BECK,
Assistant Attorney General of Nebraska,
Counsel for Respondent.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

That the petitioner in this case, Alfonse Dobrusky, is asking that a writ of certiorari issue out of this court to review a judgment of the Supreme Court of Nebraska affirming the conviction of the petitioner in the District Court of Otoe County, Nebraska.

NATURE AND STATEMENT OF THE CASE.

The statement contained in the petition for the writ filed in this court substantially sets forth the question involved.

SUMMARY OF POINTS AND ARGUMENT.

Point A.—Where the Federal question is raised for the first time in the petition for the writ of certiorari in this court, it is raised too late, and insufficient to enable the Supreme Court of the United States to consider the question raised.

Point B.—In ruling upon a motion for a new trial based on alleged misconduct of the jury, the trial court's action is one of discretion and its ruling will not be disturbed unless an abuse of discretion is shown.

ARGUMENT.

Point A.

Where the Federal question is raised for the first time in the petition for the writ of certiorari in this court, it is raised too late, and insufficient to enable the Supreme Court of the United States to consider the question raised.

This question has been decided by the Supreme Court of the United States in many cases, including the following:

Montana ex rel. Haire v. *Rice*, 204 U. S. 291, 27 Sup. Ct. Rep. 281, 51 L. ed. 490.

Cox v. *Texas*, 202 U. S. 446, 26 Sup. Ct. Rep. 671, 50 L. ed. 1099.

Bolln v. *State of Nebraska*, 176 U. S. 83, 20 Sup. Ct. Rep. 287, 44 L. ed. 382.

St. Louis & S. F. R. Co. v. *Shepherd,* 240 U. S. 240, 36 Sup. Ct. Rep. 274, 60 L. ed. 622.
Mattox v. *United States,* 146 U. S. 140, 13 Sup. Ct. Rep. 50, 36 L. ed. 917.

An examination of the record in this case discloses that in the motion for a new trial (R. 4) there is no allegation or claim that the constitutional rights of the defendant were violated. In the amendment to the motion for a new trial (R. 8) there is no allegation as to the violation of any of the defendant's constitutional rights and there is but the following statement contained therein as to the jury "misconduct of the jury." There is no other allegation in the amendment to the motion for a new trial with reference thereto. It is true that an affidavit was filed in support of this amended motion for a new trial in which one of the jurors purports to say (R. 12) that the bailiff, who was the sworn officer in charge of the jury, was in the jury room during the deliberation of the jury for a period of a little more than five hours. The record further discloses, however, that evidence was taken on this subject and the bailiff was examined, not only by the counsel for the State and counsel for the defendant, but the trial court examined the bailiff on the witness stand as to his activities (R. 36 to 44). It was on this state of the record that the court ruled on the motion for a new trial charging the jury with misconduct.

It is also true that the decision of the Supreme Court of Nebraska did not touch upon the claimed error as to the misconduct of the jury, and it is also true that this was called to the court's attention in the motion for rehearing filed in the Supreme Court (R. 52), but it is notable that no Federal question is raised by the allegations of the motion for rehearing, nor is any claim made

that his constitutional rights had been invaded. It is only now in his petition for a writ of certiorari, filed in this court, and for the first time, alleged that the constitutional rights of petitioner have been invaded in the trial of the prosecution against him. Under the decisions of this court in the cases cited herein, we believe that his contention now comes too late, for it is quite apparent that it is an afterthought, an attempt to now have his case heard again by the assertion of a violation of his rights known to him before, but not asserted at the time.

In *Bolln* v. *Nebraska,* cited above, the Supreme Court says:

> "We have repeatedly decided that an appeal to the jurisdiction of this court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained. It is true that this court has sometimes held that, if a Federal question appear in the record and was decided, or such decision was necessarily involved in the case, and that such case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review here; but such cases have usually, if not always, arisen under the 1st or 2d clauses of § 709, and have involved the validity of a treaty, statute, or authority exercised under the United States, or the validity of a statute or authority exercised under a state, where such statute or authority is alleged to be repugnant to the Constitution or the laws of the Untied States. (Columbia Water Power Co. v. Columbia Electric Street R. Light & Power Co., 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.) In the case under consideration the right to a trial by jury is claimed

under the Constitution of the United States; but, as it was never set up or claimed prior to the decision of the supreme court of the state, it is too late to raise the question here."

And in *Cox* v. *Texas,* cited above:

"A Federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on writ of error to the state court, where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court."

In *St. Louis & S. F. R. Co.* v. *Shepherd,* cited above, the court held as follows:

"A Federal question first set up and asserted in a petition for rehearing after the judgment in the trial court had been affirmed by the highest court of the state will not support the jurisdiction of the Federal Supreme Court on writ of error, where the petition was not entertained, but was denied, without passing on the Federal question thus tardily raised."

Also in *Montana ex rel. Haire* v. *Rice,* cited above, the court held the following:

"Raising the Federal question for the first time in the petition for a writ of error to a state court and in the accompanying assignment of errors is not sufficient to enable the Supreme Court of the United States to consider that question, even though another Federal question has been properly raised and brought up by the same writ of error."

Point B.

In ruling upon a motion for a new trial based on alleged misconduct of the jury, the trial court's action is one of discretion and its ruling will not be disturbed unless an abuse of discretion is shown.

Chambers v. *United States,* 237 Fed. 513.
Matters v. *State,* 120 Neb. 404, 232 N. W. 781.
Murray v. *State,* 119 Neb. 16, 226 N. W. 793.
Simmons v. *State,* 111 Neb. 644, 197 N. W. 398.
Williams v. *Chicago & N. W. Ry. Co.,* 11 So. Dak. 463, 78 N. W. 949.

In a consideration of this matter, the rule seems to be well stated in *Chambers* v. *United States,* cited above, in which it is said at page 521:

> "The opinions in these and other cases have been read and considered, and the conclusion is that the stronger reasons and the weight of authority sustain the rule that, where a motion for a new trial is made on account of communications to the jury during their deliberations, there is a rebuttable legal presumption that they were prejudicial to the moving party, that this presumption may in some cases be overcome by evidence, and that where competent evidence is offered it is the duty of the trial court to hear and consider it, and that when it does so, and decides the motion thereon, its decision is discretionary, and is reviewable by a federal appellate court for abuse of discretion only."

With that rule in mind when we examine the record in this case, we find that the point is raised by the filing of an affidavit of one of the jurors in which he states as follows:

> "Affiant further says that the deliberation of said jury continued in the regular jury room which is entered from the District Court room of Otoe

County, Nebraska, at the southeast corner of said court room; that thereafter about the hour of 12:30 A. M., on the morning of February 29, 1940, the said jury left the said regular jury room and thereafter remained in the District Court room of the District Court of Otoe County, Nebraska, until about the hour of 6 o'clock A. M., during all of which said time the said George Johnson, as bailiff of said court and sworn officer in charge of said jury remained in said District Court room in the presence of said jury."

This is after the jury had retired for deliberation and it appears from the evidence taken in the examination of this problem by the trial court that the jury deliberated in the regular jury room until about twelve o'clock, midnight, when they were taken to a restaurant for sandwiches and coffee. It appeared that the heat had been turned off in the building in the regular jury room in which they were deliberating and it was cold, so the bailiff permitted them to continue their deliberation in the District Court room. It appeared further that the bailiff closed the doors to the court room and occupied two chairs at the door. It was much warmer in the hall than it was in the court room and occasionally he would open the door to permit heat to go into the court room from the hall, but that at the times when the doors were so opened there was no one else about the building and that the jury was not actually engaged in deliberation or taking a vote. They were playing cards or other games and making a lot of noise. It is to be noted that in the affidavit filed by the juror it is not alleged or stated that any communication was had between the bailiff and any of the jurors. It is not stated in that affidavit that any effect was had by the presence of the bailiff on any member of the jury. The bailiff in his testimony positively denied talking to any of the jurors or making any

comment about the matter upon which they were deliberating and the only times that the doors were opened at all was for the comfort of the jury or to turn off the lights in the court room. From the testimony of the bailiff himself it appears that the statement contained in the affidavit of the juror is entirely misleading because the bailiff did not remain in the court room in the presence of the jury at any time. Even when the doors were opened to permit heat to go into the court room he remained outside of the door and not in the presence of the jury at all. It seems to us that the rule stated in *Chambers* v. *United States* is particularly applicable to this situation. Evidence was offered, both in support of the motion for a new trial and in opposition thereto, and the court after hearing the evidence and in the exercise of its discretion overruled the motion for a new trial. Then the only question presented is whether or not the trial court abused its discretion. The rule is well stated in *Simmons* v. *State*, cited above, as follows:

> "Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown."

This same rule is followed in the other Nebraska cases cited.

We do not believe there is any conflict of state court decisions, as asserted in the brief of the petitioner. The rule being what it is in Nebraska, each case involving the question is decided on its own merits and an examination of the cases cited by the petitioner in his brief discloses that a different situation existed in each of them and all of them disclose a far more fagrant violation of the privacy of the jury in its deliberation.

In the case of *Mattox* v. *United States*, cited in petitioner's brief, it appears that there was a flagrant violation of the privacy of the jury during its deliberation, by remarks made by the bailiff, and also the fact that newspapers outlining the case were permitted in the jury room. However, offers of proof of these facts by affidavit of some of the jurors was denied by the court and the Supreme Court laid down the rule that while the result of a motion for a new trial could not be reviewed by writ of error, yet, the exclusion of affidavits in passing upon the motion was an act that could be reviewed by the Supreme Court upon the question of their admissibility.

We have investigated the other cases cited by the petitioner and a comment here may assist the court in arriving at the proper holding of those cases.

Slaughter v. *State*, 24 Texas 410:

In this case the defendant relied on improper conduct of the bailiff in being with the jury during their deliberations. The court says in the opinion that there is nothing shown which would implicate the jury in any misconduct even though the bailiff was with the jury during their deliberation, and says:

> "Such violation of his duty, however, might be attended with circumstances that would render the jurors liable to the imputation of misconduct and be ground for a new trial, if it were such as to engender the opinion that the defendant had not received a fair and impartial trial."

The cause was reversed on other grounds.

State v. *Cartright*, 20 W. Va. 32:

> "On the trial of an indictment for a felony, after all the evidence has been heard by the jury, and

> they have been put in charge of the officer for the night, the said officer at the instance of some of the jury brings to the jury-room one of the principal witnesses for the prosecution, who was an active participant in the fight, which caused the indictment, to play the fiddle for the jury. Said witness came into said room and remained there with the jury and the officer for half an hour fiddling for the jury; and in response to an inquiry from a brother of said witness, who came to the jury-room, while said witness was in the room with the jury, said officer stated, that said witness was not in the room. Afterwards the jury heard the argument of counsel and returned a verdict of guilty. On a motion to set aside the verdict the jury and the officer file affidavits, that no conversation or communication was had between the jury and said witness touching the trial or in any manner whatever, and that the presence or conduct of said witness had no influence on their verdict; but the affidavit of said witness was not taken, nor was any excuse offered for not taking it. This was ground for setting aside the vervict (p. 44)."

State v. *Robinson*, 20 W. Va. 713:

In this case the question raised was as to the separation of the jury, and it seemed to be established that outsiders had contact with several of the jurors. This was sufficiently established by the testimony in the case, and in addition, newspapers had been given to the jurors, and various members of the jury had received sealed letters, and for this and other errors the case was reversed.

Hoberg v. *State*, 3 Minn. 262:

In this case misconduct of the jury was alleged, but the only proof furnished was that the District Judge who tried the case had visited and had communication with

them apart from the prisoner and his counsel. The Supreme Court criticized this conduct, but said that in this case there was no error in so doing. However, the case was reversed on other grounds.

State v. *Snyder,* 20 Kan. 306:

> "2. *Criminal Law; Deliberation of Jury; Presence of Officer.* After a verdict of guilty had been returned by a jury against an accused for the offense of obtaining by false pretenses the signature of a firm to a check of $850, and in support of a motion for a new trial affidavits were filed proving that the bailiff who had the jury in charge, and who had testified on the trial on the part of the prosecution to material facts against the prisoner, was with the jury in the jury-room the greater part of the time while they were deliberating on their verdict, and the state made no explanation of the presence of the officer with the jury in their consultations together, nor any showing that the rights of the prisoner were not prejudiced by the acts and conduct of such officer and witness, *held,* that the verdict should have been set aside and a new trial granted."

State v. *Simon,* 101 N. J. L. 11, 127 Atl. 570:

In this case, it seemed to be established that during the evening and while the jury were deliberating, they were turned loose in the court room in the presence of a number of court officers and free to discuss general topics with them, that there was a discussion of general topics, telling of stories, and other general conversation. For this and other errors alleged, the case was reversed.

McClary v. *State,* 75 Ind. 260:

In this case, the court held the affidavit filed in support of the claim of the presence of the bailiff in the jury room with the jury during their deliberation to

have been insufficient because it did not directly aver that the bailiff was in the jury room but only that after the jury were discharged, the bailiff told the affiant juror that he was in the jury room the greater portion of the time while the jury were in consultation, and held:

> "*Insufficiency of Affidavit.*—An affidavit, filed in support of a motion for a new trial on account of the misconduct of the jury, in permitting their bailiff to be present during their deliberations, which states 'that the bailiff told the affiant that he was in the jury-room the greater portion of the time while the jury were in consultation,' is insufficient to prove that the bailiff was in the room as alleged."

This case was affirmed.

Cole v. *Swan,* 4 G. Greene's (Ia.) 32:

In this case, it seems to have been established that the bailiff told the jury that they would be kept by the court from Saturday evening until Monday morning without anything to eat unless they would agree upon their verdict, and that in consequence of this, one of the jury consented that a verdict might be returned. The court held this to be error and the case was reversed.

Hare v. *State,* 4 Howard (Miss.) 187:

It was established in this case that after the jury had retired for deliberation under the charge of a sworn officer, that a stranger was permitted to go into the jury room and discuss facts of the case with them while the bailiff was absent getting some water for the jury. A new trial was granted.

Rickard v. *State,* 74 Ind. 275:

In this case, an affidavit was filed by one of the jurors that the bailiff, during the time the jury was deliberating, had access to their room and frequently passed in and

out thereof, and remained with the jury a large portion of the time while they were deliberating and considering their verdict. This affidavit was not controverted by the State, and the cause was reversed.

> "Under the statutes of this State, an officer having a jury in charge, either in a civil or criminal case, has no authority to speak to them, except to ask them if they have agreed upon a verdict, unless by order of the court, and he ought not in either case to be allowed to be present with the jury during their deliberations; his presence, even though he does not speak to the jury, and though it does not appear to have caused any injury, is sufficient to vitiate the verdict returned by the jury."

People v. *Knapp*, 42 Mich. 267:

In this case, it was established that when the jury retired to deliberate their verdict, the officer accompanied them and remained in the room during their deliberations. This fact was made known to the trial court in the motion for new trial, but on its being made to appear that the officer did not converse with the jury, the court denied the motion. This was held to be error by the Supreme Court with the rule:

> "A verdict in a criminal case may be set aside and a new trial granted if the officer who attended the jury remained in the jury-room during their deliberations."

State v. *Scholl*, 118 Kan. 629, 236 Pac. 816:

> "At the hearing on the motion for new trial it was shown that while the jury were deliberating the judge of the court went several times to the door of the jury room and conversed with the jury. On one occasion the judge had his head in the door of the jury room for several minutes. From a state-

ment made by the judge in denying the motion, it appears that nothing actually prejudicial occurred, and a majority of the court are inclined to apply the statute forbidding reversal unless substantial rights are materially infringed. The conduct exhibited was, however, highly improper. Throughout the proceeding in a criminal case the trial judge's place is on the bench. The jury room is a place of seclusion and privacy for members of the jury while they are deliberating on their verdict. The trial judge has no privilege to invade it, and all his communications with the jury ought to be in open court."

The conviction was affirmed.

Bramlett v. *State*, 129 Neb. 180, 261 N. W. 166:

In this case it was established that the bailiff went into the jury room and said to one of the members of the jury, who was holding out for acquittal, "What the hell is the matter with you, get busy," and to another, "You're not going to hold them back alone, are you?" and then said, "The judge will be here about 2 o'clock and then will be gone all afternoon." There was no evidence offered in opposition to the above and the court very properly held that the verdict of the jury should be set aside in such circumstances.

Gandy v. *State*, 24 Neb. 716, 40 N. W. 302:

In this case it appeared that the bailiff remained in the room with the jury during the time it was deliberating and the court held that it was sufficient to set aside the verdict of the jury.

Cooney v. *State*, 61 Neb. 342, 85 N. W. 281:

In this case it appeared that the officer who had given evidence in the case also had charge of the jury during

its deliberation and that he and the bailiff were in the same room with the jury during its deliberation, and the court very properly held that it was sufficient to set aside the verdict.

However, in *Williams* v. *Chicago & N. W. Ry. Co.*, 11 So. Dak. 463, 78 N. W. 949, it appeared that the bailiff was invited into the jury room where they were deliberating because it was cold and there was no fire in the part of the building where the bailiff was required to stay and that the bailiff went into the jury room and lay on the floor. He did not converse with any of the jurors, nor was any vote taken while he was present in the room, nor anything said about the case. As soon as he had warmed himself he left, and the court held that in the absence of any showing of influence or impression made upon any member of the jury that it was not misconduct sufficient to justify the granting of a new trial.

We quite agree with the general rule as heretofore stated in this brief and that even the presence of the bailiff, or any other person, in the room with the jury while it is deliberating is presumptively influential upon their verdict and certainly it violates the right of privacy of the jury, and undoubtedly impedes that free and untrammeled discussion of the evidence necessary in order that a verdict may be reached, but it is hardly conceivable that a jury may be instructed and retire to their jury room, deliberate for many hours, and then be returned to the court room without some contact with the bailiff. He it is who must escort them from the jury room to the restaurant in order that they may eat during their deliberation. He must return them to the jury room and if an emergency should arise wherein the assistance of a doctor was needed or one of a thousand other things might occur, certainly the bailiff may not

be charged with having violated the privacy of the jury by attending to the comforts thereof as the necessity arises. The same rule would seem to be that unless there is some showing which was sufficient to justify the court in finding that some influence had been brought to bear on the jury, either actual or presumptive, before the court could be said to abuse its discretion in overruling the motion for a new trial based upon that ground.

CONCLUSION.

We respectfully submit that the petition for the writ of certiorari should be denied, first, because the raising of the Federal question came too late, and, second, because there has actually been no invasion of the constitutional rights of the petitioner in the trial of his case or in its affirmance by the Supreme Court of Nebraska.

Respectfully submitted,

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